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Report of the Special Rapporteur on the human rights to safe drinking water and sanitation

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on the human rights to safe drinking water and sanitation, prepared pursuant to Council resolutions 27/7 of 2014 and 33/10 of 2016. The focus of the report is service regulation and its role in the progressive realization of the human rights to water and sanitation. The Special Rapporteur begins the report by outlining the human rights obligations of States, regulatory actors and service providers in the context of service regulation. He provides an overview of the role of regulation in water and sanitation services, identifies different types of regulatory frameworks and discusses how they relate to the human rights standards. He discusses the core functions of regulatory actors. Finally, he presents recommendations to States and regulatory actors regarding these issues.

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Report of the Special Rapporteur on the human rights to safe drinking water and sanitation

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I. Introduction

1. Pursuant to Human Rights Council resolutions 27/7 of 2014 and 33/10 of 2016, the Special Rapporteur on the human rights to safe drinking water and sanitation, Léo Heller, was mandated to work on identifying challenges and obstacles to the full realization of those rights, as well as protection gaps, good practices and enabling factors. The subject of the present report is the regulation of water and sanitation services in the context of realization of human rights and the report aims to discuss the essential role that regulatory frameworks can play in the implementation of these human rights at the national level. In this respect, it outlines the legal obligations and responsibilities of States, regulatory actors and service providers in progressively realizing the human rights to safe drinking water and sanitation through regulatory frameworks.

2. As part of the consultation process, the Special Rapporteur invited States and non-State actors to contribute their views and perspectives in writing, through a questionnaire. A total of 43 submissions were received.[1] Eighteen submissions were received from States, and 25 submissions were received from non-State actors including civil society organizations, private service providers, academia and international organizations. Furthermore, in order to collect the views of other stakeholders, the Special Rapporteur convened an expert consultation which was held on 22 and 23 May 2017 in Rio de Janeiro, Brazil.

3. The incorporation of the human rights to water and sanitation into national legal frameworks can be done at different levels and using different instruments, including the constitution, legislation, policies and regulations. States have an immediate and legally binding obligation to take deliberate, concrete and targeted steps to the maximum of their available resources to achieve progressively the full realization of these human rights (see art. 2 of the International Covenant on Economic, Social and Cultural Rights). This includes the obligation to adopt legislative measures, as explicitly stipulated in the Covenant, and the obligation to take steps to establish regulatory frameworks informed by the standards and principles that underpin those rights.

4. When the terms "regulatory framework" or "regulation" (in general) are used in the report, they refer to secondary legislation such as norms, rules or standards establishing how services should be provided in a given context and the institutions responsible for monitoring compliance with these norms and standards. The terms "regulatory body", "regulatory authority" or "regulator" refer to a separate body to which the State delegates regulatory functions. These bodies are often responsible for setting standards and applying and enforcing them. The term "regulatory actors" is used in a broad sense, and includes government institutions that exercise regulatory functions (i.e. a department within a ministry) and separate bodies created by the State to carry out regulatory functions.

5. The number of States with a regulatory framework for water and sanitation services is increasing and so is the contingent of regulatory actors. However, there is no universal regulatory model. Regulation should be adapted to local circumstances, needs and challenges. International human rights law does not prescribe a particular choice of regulatory framework. What is essential from a human rights perspective is that those carrying out regulatory functions be immune to pressures from any illegitimate interests and that the main objectives of regulation be aligned with the human rights to drinking water and sanitation.

[1] See www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/ServiceRegulation.aspx.

II. Human rights obligations and responsibilities

A. Obligations of States

6. The State is the primary duty bearer for the realization of the human rights to water and sanitation. While the International Covenant on Economic, Social and Cultural Rights, in article 2, provides for progressive realization and acknowledges the constraints due to limits of available resources, it also imposes on States various obligations of immediate effect. In the context of service regulation, the obligations under article 2 include: (a) the obligation to take deliberate, concrete and targeted steps to put in place a regulatory framework for water and sanitation service provision that is aligned with human rights; and (b) the obligation to ensure that the rules and regulations set and the activities of those exercising regulatory functions contribute to the enjoyment of the human rights to water and sanitation without discrimination of any kind. For example, the exercise of the human rights to water and sanitation should not be conditional on, or determined by, a person's place of residence (e.g. whether a person lives or is registered in an urban or a rural area, or in a formal or an informal settlement).[2] The State's failure to take the necessary regulatory measures in order to adequately prevent and remedy discriminatory conduct either by service providers or by regulatory actors constitutes a violation of the State's obligations under the International Covenant on Economic, Social and Cultural Rights.

7. The human rights obligations of States are classified as obligations to respect, to protect and to fulfil. The obligation to respect requires that States' regulatory frameworks refrain from interfering directly or indirectly with people's existing access to water and sanitation. To that end, States must ensure that their regulatory framework prohibits disconnections from water and sanitation services due to users' inability to pay, as it is a retrogressive measure and violates the human rights to water and sanitation,[3] must ensure, when extending piped networks to informal settlements, that these services are affordable so as not to interfere with people's access, and must avoid discriminatory or unaffordable increases in the price of water and sanitation services due to inadequate regulation. Furthermore, preparedness for situations of armed conflict, emergency situations, natural disasters and effects of climate change requires that States embrace in their regulatory frameworks the obligations relevant to water and sanitation provision pursuant to international humanitarian law.

8. The obligation to protect requires States to prevent third parties from interfering in any way with the enjoyment of the human rights to water and sanitation by establishing an effective regulatory system, which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance.[4] In cases in which the provision of water and sanitation services is delegated to third parties, the State has the obligation to regulate the activities of those institutions to ensure that all aspects of human rights are guaranteed (see A/HRC/33/49/Add.2). Establishing an effective regulatory framework comprises the obligations to set service standards in line with the normative content of the human rights to water and sanitation, and to create public authorities to carry out regulatory functions independently.

9. Failures to protect the rights to water and sanitation in the context of service provision usually stem from a lack of regulation or lack of enforcement of such regulation. They may also be the result of negotiating service contracts or performance agreements that fail to protect users' rights. When the provision of services is regulated by contract, States must ensure that the relevant human rights standards and principles are addressed in the

[2] See Committee on Economic, Social and Cultural Rights general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para. 34.

[3] See Committee on Economic, Social and Cultural Rights general comment No. 15 (2003) on the right to water, para. 44 (b).

[4] Ibid., para. 24.

contract, but also that State obligations are transferred, as appropriate, to the service providers.[5]

10. Violations of the obligation to protect may occur when States fail to effectively regulate and control service providers in relation to safety, quantity or disconnections; fail to regulate pricing to ensure that services are affordable for everyone; fail to prevent discrimination by non-State actors; do not ensure that service providers extend services to marginalized households or communities; or fail to ensure that monitoring and complaints procedures are in place (see A/HRC/27/55, para. 27).

11. The obligation to fulfil has three components: the obligation to facilitate, the obligation to promote and the obligation to provide. The obligation to facilitate requires States to take positive regulatory measures to create an enabling environment for service providers to respect the human rights to water and sanitation as well as to contribute towards the full realization of these rights. Facilitating measures include not only according recognition of these rights within national policies and legal frameworks and adopting national strategies and plans of actions to realize them, but also setting service standards for service providers to comply with, in line with the normative content of the human rights to water and sanitation, monitoring service providers' compliance with the established standards, and exercising regulatory functions, directly or through a separate body. For example, where, due to a lack of regulation, access to water and sanitation facilities is either not available or inadequate in public buildings, such as schools, prisons or hospitals, or where people living in informal settlements are left with no option but to resort to unregulated informal services, the State is in breach of its obligation to facilitate.

12. The obligation to promote requires States to provide information and guidance for service providers and the population on how to comply with the standards, norms and regulations set. This obligation also entails informing and training regulatory actors on the practical implications of the human rights to water and sanitation in their area of work.

13. The obligation to provide obliges States to fulfil the rights to water and sanitation when individuals are unable, for reasons beyond their control, to realize these rights themselves by the means at their disposal. In this respect, it is crucial that the State sets specific regulations for the provision of services, inter alia, to homeless people, to poor nomadic communities, and to victims of situations of armed conflict, emergencies, natural disasters or climate change effects.

14. Violations of the obligation to fulfil include the State's failure to take steps to establish a regulatory framework in line with human rights standards, and the failure to ensure, through its regulatory framework, that the minimum essential level of water and sanitation services is enjoyed by everyone.

B. Obligations of regulatory actors

15. The human rights to water and sanitation are binding on the State as a whole. All public or governmental authorities, or separate State bodies exercising regulatory functions at national, regional or local levels, have the responsibility to realize the State's human rights obligations. To that end, regulatory actors must ensure that their policies, procedures and activities are compliant with the State's international human rights obligations in relation to the rights to water and sanitation. Their obligations also include ensuring human rights compliance by the municipalities and other entities that they regulate (see A/HRC/36/45/Add.1, para. 31).

16. In their key areas of action, which include standard-setting, monitoring and ensuring accountability for service provision, regulatory actors are bound by the principle of

[5] See a checklist for government authorities of the human rights to water and sanitation issues that need to be addressed in negotiations over any contract, concession or licensing document, from the government perspective, in *Realising the Human Rights to Water and Sanitation: A Handbook by the UN Special Rapporteur* (booklet 8: checklists), available from http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/Handbook.aspx.

progressive realization, but also by the immediate obligation of non-discrimination and the obligation to take steps towards the full realization of these rights. The Committee on Economic, Social and Cultural Rights underscores that the enjoyment of the human rights to water and sanitation without discrimination of any kind can be compromised not only through direct action or omission by States, but also through State institutions or agencies at the national and local levels, which includes regulatory actors.[6] For regulatory actors to meet their immediate obligations of equality and non-discrimination, they must, when regulating tariffs, consider those who do not have the economic ability to pay for services, and implement mechanisms for their protection; they must also ensure that service providers deliver services to poorer neighbourhoods and informal settlements.

17. While the existence of national policies and strategies supported by the human rights to water and sanitation contributes greatly to the creation of an enabling regulatory environment, regulatory actors cannot simply dismiss their human rights obligations on the grounds that national policies are inadequate. Being at the interface between policymakers, service providers and users, and as guarantors of accountability, regulatory actors are best placed to assess whether water and sanitation standards are being progressively met or are being overlooked. They have also the primary role in identifying retrogressions in the realization of the rights and in requiring providers to address the root causes of these violations. As such, their obligation to monitor service providers' compliance with the standards of the human rights to water and sanitation and to identify what is compromising the realization of these rights goes far beyond mere policing. It involves, for example, supporting and influencing investment decisions, and policy and legislative changes in line with the human rights framework.

18. The International Water Association's Lisbon Charter, on public policy and regulation for drinking water supply, sanitation and wastewater management services, adopted by 85 Governments in 2015, asserts that the actions of regulatory actors "must be based on the principles of competence, professionalism, impartiality, accountability and transparency" (art. 4). From a human rights perspective, there are additional key principles that must guide regulatory intervention in all circumstances: the principles of equality and non-discrimination; active, free and meaningful participation; access to information; and sustainability. These overarching principles should not only guide national policies on water and sanitation but also be embedded in legal and regulatory frameworks binding all water and sanitation stakeholders, including regulatory actors.

19. Access to information is crucial to the work of regulatory actors, who have an obligation to collect, analyse and disseminate accurate and disaggregated information on the implementation of the rights to water and sanitation by the service providers that they regulate. Access to information is essential for enabling meaningful participation. In this context, it is important to highlight that regulatory actors' obligation to ensure meaningful public participation in key regulatory decisions, including tariff-setting, is not in any way incompatible with their required independence.

C. Responsibilities of service providers

20. All service providers, whether public, State-owned or private, must comply with the State's legal and regulatory framework. In cases where the State is the service provider, at central level or often through its municipalities, it must act in compliance with the laws and regulations of the State and in line with its international human rights obligations. Where service provision is formally delegated by the State to non-State actors, the State cannot exempt itself from its human rights obligations and retains the obligation to regulate and monitor their activities. Non-State service providers (formal and informal), on the other hand, have human rights responsibilities, which include complying with the national regulatory framework and respecting the human rights to water and sanitation.[7]

[6] See Committee on Economic, Social and Cultural Rights general comment No. 20, para. 14.

[7] See the Guiding Principles on Business and Human Rights.

21. At a very minimum, State-owned companies have the same responsibilities as other businesses and must comply with the national regulatory framework. When State-owned companies act as arms of government or implementing agents of government policy, the State must ensure policy coherence and guarantee that the activities of those companies contribute to the realization of the human rights to water and sanitation.

22. The instruments delegating service provision, including contracts, must reflect the national regulatory framework and human rights standards. This means that these instruments should include a clear definition of the human rights responsibilities of service providers, coverage targets to eliminate inequalities in access, sufficient provision for participation, access to information and mechanisms for accountability. While ensuring this, non-State service providers are also expected to respect human rights. To that end, they must exercise due diligence to become aware of and address any potential impact on the realization of the human rights to water and sanitation, including by analysing the proposed delegating instruments from a human rights perspective (see A/HRC/15/31, para. 38), and where appropriate by undertaking human rights impact assessments. The General Assembly has recently called upon non-State actors, including business enterprises, to comply with their responsibility to respect the human rights to water and sanitation, including by cooperating with State investigations into allegations of abuses of these rights, and by progressively engaging with States to detect and remedy such abuses (see General Assembly resolution 70/169, para. 6).

23. As part of their human rights responsibilities, service providers should establish legitimate, accessible, predictable, equitable, rights-based and transparent grievance and remedy mechanisms that allow individuals to bring alleged human rights abuses to their attention (see A/HRC/8/5, paras. 82 and 92). This should be required by the regulatory framework as it is part of exercising human rights due diligence, since accountability mechanisms enable the service provider to become aware of its human rights impacts. Equally important is the responsibility of service providers to provide regulatory actors with the necessary information regarding service provision, especially information on their performance.[8]

III. Regulation in water and sanitation services

A. Role of regulation

24. The implementation of the human rights to water and sanitation depends heavily on national legal and regulatory frameworks. While constitutional recognition of these rights shows a strong national commitment to their realization, and facilitates their inclusion in domestic laws, it does not constitute a *conditio sine qua non* for their inclusion in national legal frameworks. Kenya, for example, underwent a process of legal and regulatory reform before enshrining these rights in its Constitution. Laws give voice to national policies, and aspire to achieving universal realization of the rights, while rules and regulations set performance standards and determine how services should be provided to the population, as they encapsulate the technical and scientific requirements needed to give meaningful content to the general terms contained in laws. The fact that the provision of water and sanitation services must be adequate for human dignity, life and health, in accordance with the International Covenant on Economic, Social and Cultural Rights, places concrete human rights obligations on national regulatory frameworks.

25. Regardless of the regulatory model chosen, currently most water and sanitation regulatory frameworks typically incorporate aspects of economic regulation (asset management planning and tariff-setting), of quality of service regulation and of drinking water quality regulation. Some may also include aspects of environmental regulation, mainly water abstraction and wastewater discharges, of user interface regulation or of legal and contractual regulation. The fact that different forms of regulation have been adopted for

[8] Lisbon Charter, art. 5.

specific purposes without explicit mention of the human rights to water and sanitation standards or principles does not necessarily mean that those forms of regulation do not take into consideration at least partially these standards and principles.[9] In this context, it is essential to emphasize a distinction between fully incorporating the human rights to water and sanitation into regulatory frameworks and choosing some selected aspects of it to comply with. For States to fulfil their human rights obligations, the whole human rights to water and sanitation framework must be reflected in States' regulatory norms and activities.

26. It is widely accepted that the scope for competition in the water and sanitation sector is limited, due to the prominence of significant upfront, sunk costs. This situation commonly results in the existence of a single service provider — public or private — in a given area, defined as natural monopoly, reinforcing the need for adequate regulatory measures to ensure that the rights of users are not compromised. In fact, historically, the rationale for introducing regulation in the water and sanitation sector has been related to instances of "market failure", in particular, prevention of monopoly abuse.[10] In such monopoly situations, regulatory bodies may be more exposed to the risk of capture by providers, due to information and power asymmetries among other factors, and by political interests, since these bodies are part of governments.[11]

27. Some authors argue that in recent years there has been a gradual shift in the normative goals of regulation from "pure" economic goals to a greater level of inclusion of social objectives. Some contend that the rationale for the regulation of water and sanitation services should involve three dimensions of sustainability: (a) the social sustainability of the services, by protecting users' interests; (b) the economic, infrastructure and human resource sustainability of the entities providing the services; and (c) the environmental sustainability, in terms of the efficient use of environmental resources.[12] Others have identified "human rights" as an additional regulatory rationale, according to which the regulatory body protects service users' rights directly "through developing standards reflecting these rights and monitoring their application through inspection".[13] From a human rights perspective, the regulatory framework's objectives, activities and norms should be derived from the human rights framework.

28. The role of regulation and monitoring becomes particularly challenging in rural areas and in densely populated informal settlements in urban areas, where large proportions of the population are not served by a piped network and rely on informal small-scale providers, which often operate unregulated and as a result provide poor-quality services at high prices.[14] Given the informal nature of the provision, and the lack of regulation and monitoring, users of such services do not have a complaint mechanism that they can avail themselves of when services are inadequate or unaffordable.

B. Types of regulatory frameworks

29. States have interpreted the role of regulation in various ways, depending largely on the norms applicable to their particular context and the needs that correspond to that context, which leads to a range of different regulatory models and institutional arrangements. The most appropriate approach differs from country to country and depends

[9] Robert Bos and others, *Manual of the Human Rights to Safe Drinking Water and Sanitation for Practitioners* (London, International Water Association, 2016), p. 58.

[10] Richard Franceys and Esther Gerlach and others, *Regulating Public and Private Partnerships for the Poor* (Cranfield University), chap. 3, p. 2.

[11] Emilio J. Lentini and Gustavo Ferro, "Políticas tarifarias y regulatorias en el marco de los Objetivos de Desarrollo del Milenio y el derecho humano al agua y al saneamiento", *Recursos Naturales e Infraestructura*, No. 164 (Economic Commission for Latin America and the Caribbean, 2014).

[12] Jaime Melo Baptista, *The Regulation of Water and Waste Services: An Integrated Approach (RITA-ERSAR)* (International Water Association Publishing, 2014), p. 43.

[13] Julian Daniel López Murcia, "Regulatory agencies and courts in the South: the overlaps in Colombian water regulation", *Journal of Politics in Latin America*, 5, 2 (2013), pp. 105-132.

[14] UN-Water Global Analysis and Assessment of Sanitation and Drinking Water, *Investing in Water and Sanitation: Increasing Access, Reducing Inequalities* (2014 report), p. 19.

on the general regulatory framework, the levels of institutional capacity and the types of problems that must be addressed.

1. Self-regulation

30. In some countries, regulatory frameworks include the model of self-regulation, whereby public service providers regulate their own activities, set tariffs and quality standards and monitor their own performance. Many countries with public service providers have not seen the necessity of creating a separate regulatory function for the water sector. In El Salvador, the National Water Mains and Sewers Administration, the main service provider in urban areas, sets its own quality of service standards, while the Ministry of Health monitors the quality of drinking water and the Ministry of Economics approves changes to water rates (see A/HRC/33/49/Add.1, para. 25). In Tajikistan, the Ministry of Energy and Water Resources has the overall responsibility for guaranteeing the national drinking water supply and coordinating relevant actors in the water sector (see A/HRC/33/49/Add.2, para. 10). It is also responsible for the adoption and implementation of State programmes for the development of drinking water supply systems, the establishment and regulation of water tariffs and the provision of public information.

31. Self-regulation raises significant human rights challenges in terms of guaranteeing independent monitoring and providing reliable accountability mechanisms. Regulatory principles such as impartiality, accountability, transparency and good governance can potentially be compromised by self-regulation as there is no separation between policy, regulation and service provision. Benchmarking and user consultation and participation also seem to be less common. Self-regulation can also lead to a lack of uniformity in performance, including in tariff-setting, with different service providers abiding by different standards.

2. Regulation by contract

32. Regulatory frameworks may also be characterized by a broad spectrum of contractual arrangements between governments which formally delegate service provision, and third parties. In such cases, the instrument delegating service provision defines the relationship between the public asset owner and the service provider and sets service standards. In the case of State-owned companies, management will usually be delegated via legislation, decrees or contracts, while public authorities will often enter into contracts with private providers. Contracts may differ according to the ownership of assets, the responsibility for capital investments, the allocation of risks, the responsibility for operations and maintenance, and the typical contract duration. France is a country with a long history of this type of regulation, established through private-sector participation contracting with local government.

33. A number of human rights challenges arise when regulating service provision by contract, particularly when non-State actors are involved. Such challenges include guaranteeing transparent and democratic decision-making, addressing power asymmetries in the bidding and negotiation process, ensuring affordable services, avoiding disconnections in cases of inability to pay, ensuring monitoring and accountability, and addressing corruption. It is also important that contracts, which are normally valid for decades, can be reviewed and adapted over time.

34. Meaningful public participation and access to information are human rights principles that often tend to be overlooked by States and service providers during the process of tendering, bidding and contract negotiation. From a human rights perspective, it is crucial that governments ensure that contractual arrangements include the necessary human rights safeguards, and that overall they contribute to, rather than undermine, the realization of the human rights to water and sanitation, without discrimination.

35. Regulation by contract can be combined with supervision by regulatory actors. In these cases, service standards and tariffs agreed upon by the parties to the contract have to be approved by the regulatory actor. The intervention and the oversight of the contract by a regulatory actor, if oriented by the human rights framework, can contribute to the realization of the rights to water and sanitation.

3. Regulation by a separate regulatory body

36. In the past two decades, a general trend in many countries in terms of regulation has been the establishment of public entities that are expected to be independent from providers, governments and the direct administration of the State, designated as independent regulatory bodies. The need for autonomous regulatory bodies has been reinforced by the belief that policy, regulation and provision of services should preferably be separated to ensure maximum benefit from the expertise required and to provide transparency.[15]

37. The functions of these bodies include standard-setting, examining water and sanitation services for compliance with relevant standards, providing a forum for complaints by individuals, and setting or signing off on tariffs. When the exercise of these functions is guided by the human rights framework, this regulatory model can contribute significantly to the progressive realization of the human rights to water and sanitation. However, in the absence of a strong national policy and legal framework on the human rights to water and sanitation, these bodies also face challenges in realizing these rights.

38. The International Water Association's Lisbon Charter underscores the importance of ensuring an adequate level of institutional, functional and financial independence of regulatory bodies.[16] Some of the features that would characterize independent regulatory bodies include: (a) a stable mandate, which does not depend on either the electoral cycle or changes of government; (b) autonomy in exercising their regulatory functions; (c) the definitive nature of their decisions, which can only be challenged in the courts; and (d) substantial administrative autonomy in their human and budgetary resource management.[17]

39. However, some argue that independence from the government may be both unrealistic and in some situations undesirable.[18] In essence, regulatory bodies must ensure the implementation of public policies defined by the government for the regulated sectors. This means that in situations where water policy needs to be reconciled or balanced with social and public policy in order to pursue human rights standards (e.g. affordability) or comply with the government's international human rights obligations, regulatory decision-making processes should encourage the meaningful participation of the relevant governmental sectors (see A/HRC/36/45/Add.1, para. 36). Governments should be able to legitimately influence both the process of regulatory decision-making and its outcomes in cases where regulation by itself is not sufficient to meet the standards of the human rights to water and sanitation. While the independence of regulatory bodies from governments should not be understated, particularly in countries where corruption is rampant, the question should not be considered in isolation from human rights considerations.

40. A growing number of regulatory bodies have been created in recent years. The Palestinian Water Sector Regulatory Council was established by Water Decree by Law No. 14 in 2014, and its mandate includes monitoring the performance of all service providers, approving water prices, issuing licences, setting qualitative standards and handling complaints. Similarly, in Portugal, Law No. 10/2014, establishing the Water and Waste Services Regulatory Authority, confers on the Authority monitoring and enforcement powers and the power to regulate, which apply to all service providers. This is also the case of Brazil, a federal State, which passed a National Water and Sanitation Act in 2007 that establishes guidelines for the creation of regulatory agencies at the municipal, intermunicipal or State level.

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[15] *The Regulation of Water and Waste Services: An Integrated Approach (RITA-ERSAR)*, p. 42.

[16] Lisbon Charter, art. 7.4.

[17] *The Regulation of Water and Waste Services: An Integrated Approach (RITA-ERSAR)*, p. 2.

[18] Tony Prosser, "Regulation and social solidarity", *Journal of Law and Society*, vol. 33, No. 3 (2006), pp. 364-387.

IV. Core functions of regulatory actors

A. Setting standards

41. One of the key roles of regulation is to set performance standards. Setting standards for service provision is one of the main functions of the State. The State has the duty to comply with its obligations under the International Covenant on Economic, Social and Cultural Rights and must ensure that those carrying out regulatory functions contribute to the progressive realization of the human rights to water and sanitation.[19] This means that the exercise of regulatory functions in general, and the making of regulation in particular, must comply with the human rights framework regardless of the public or State body that is carrying them out.

42. Therefore, in regulating water and sanitation services, it should be recognized, as a starting point, that water and sanitation are human rights derived from the right to an adequate standard of living (see art. 11 of the International Covenant on Economic, Social and Cultural Rights) and are inextricably related to the right to the highest attainable standard of physical and mental health (see art. 12 of the Covenant on Economic, Social and Cultural Rights), as well as to the right to life (see art. 6 of the International Covenant on Civil and Political Rights) and the right to human dignity (see arts. 1 and 22 of the Universal Declaration of Human Rights). According to international human rights law, the human right to water entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic use. The human right to sanitation entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure and socially and culturally acceptable and that provides privacy and ensures dignity. From a human rights perspective, the ultimate objective of regulation is to give practical meaning to the normative content of these rights, as follows:

1. Availability

43. Regulations should give a practical meaning to "availability" and ensure, at least, access to a minimum essential amount of water that is sufficient, reliable and safe for personal and domestic uses to prevent disease. According to the World Health Organization (WHO) guidance, an intermediate level of access, to 50 litres per person per day, represents a low level of health concern (provided that absence of contamination is rigorously assessed), while an optimal level of access, to 100 litres per person per day, represents a very low level of health concern.[20] A regulatory interpretation of "availability" should also consider situations where additional supply of water is required due to health issues, climate conditions (i.e. drought), emergency/disaster situations,[21] work conditions, or any other special circumstances; and situations of disruption to water supply.

44. With respect to sanitation, regulatory frameworks should prescribe a sufficient number of sanitation facilities within, or in the immediate vicinity, of each household (see A/HRC/12/24, para. 70). The assessment of the sanitation requirements of any community must be informed by the context, as well as the characteristics of particular groups which may have different sanitation needs (e.g. women, persons with disabilities, children). Where a piped network is not available, regulation should consider the possibility of alternative solutions, such as the construction and maintenance of sanitation facilities, and the disposal and treatment of waste water. In cases where sanitation facilities are shared, regulation should envisage a sufficient number of facilities available.

45. Regulatory standards should prioritize access to both water and sanitation facilities in public places in sufficient numbers; in institutional facilities, including hospitals,

[19] See Committee on Economic, Social and Cultural Rights general comment No. 15, para. 51.

[20] World Health Organization (WHO), "Domestic water quantity, service level and health", available from www.who.int/water_sanitation_health/publications/wsh0302/en/.

[21] WHO, "How much water is needed in emergencies", July 2013.

schools, public transport hubs, prisons, and places of detention, at the workplace and in rented housing, taking into consideration the special needs of, inter alia, women and girls; and in relation to those without a permanent dwelling, including homeless people and nomadic communities. Regulation should separate access to water and sanitation services from land tenure, often an obstacle to accessing these services in informal settlements.

2. Accessibility

46. A regulatory interpretation of physical accessibility of water and sanitation facilities should provide as minimum standards that these facilities are within safe physical reach or in the immediate vicinity of each household at all times of day and night.[22] In its proposed indicators for monitoring Sustainable Development Goal 6, the WHO/UNICEF Joint Monitoring Programme for Water Supply and Sanitation suggests that a round trip to access an improved drinking water source should not take longer than 30 minutes, including queuing (basic level), and that a basic level of sanitation should provide access to an improved sanitation facility not shared with other households. Furthermore, regulation should specifically address the situation of those with special needs in terms of accessibility, such as children, persons with disabilities, older persons, pregnant women, and people with special health conditions, and advise that the design of sanitation facilities accommodates their specific needs, while being technically safe to use. Places such as schools, preschools, care homes and detention centres require specific regulations to ensure physical accessibility.

3. Quality and safety

47. National standards must ensure that the water used for each personal and domestic use is safe for human health as regards the presence of microorganisms, chemical substances and radiological hazards.[23] The WHO *Guidelines for Drinking-Water Quality*[24] provide guidance for setting national regulations and standards for water safety in support of public health. The *Guidelines* describe reasonable minimum safe-practice requirements to protect health and provide numerical "guideline values" for constituents of water or indicators of water quality. When defining mandatory limits, the *Guidelines* are an authoritative source and must be taken into consideration in the context of local or national environmental, social, economic and cultural conditions.

48. Even when in place, regulations are not always used to their full potential and best advantage to maximize public health benefit. For example, regulations do not always clearly indicate which stakeholders are accountable and liable for identifying, responding to and mitigating risks to drinking-water quality. Regulations should also contemplate situations where water supply is unsafe, by providing coping measures (e.g. alerts) and precautionary actions. In this context, access to information on water quality is essential and should be safeguarded by regulation, using clear, easy-to-understand language, and be readily accessible to all the population.

49. The regulation of sanitation facilities should provide that they are designed and built in a way that effectively prevents human, animal and insect contact with human excreta, and should safeguard access to safe water for handwashing, anal and genital cleansing and menstrual hygiene, and ensure mechanisms for the hygienic disposal of menstrual products (see A/HRC/12/24, para. 72). The Special Rapporteur recommends that regulations require that the specific needs of women and girls are incorporated into the design, implementation, monitoring and evaluation of water and sanitation facilities (see A/HRC/33/49, para. 77 (h)). To that end, their participation in the design of the facilities should be sought by service providers.

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[22] See Committee on Economic, Social and Cultural Rights general comment No. 15, paras. 12 (c) (i) and 37 (c).

[23] Ibid., para. 12 (b).

[24] See www.who.int/water_sanitation_health/publications/drinking-water-quality-guidelines-4-including-1st-addendum/en/.

50. Regular cleaning, emptying of pits or other places that collect human excreta, and maintenance should also be regulated, in order to ensure the sustainability of sanitation facilities and continued access to them. Where on-site sanitation solutions are used, regulation must ensure that pits and septic tanks are required to be constructed in a way that contents can be adequately collected and disposed of at a sludge treatment facility rather than dumped into the environment.[25]

4. Affordability

51. Regulation must provide a multifaceted and contextual interpretation of affordability, in line with the human rights framework. National standards must ensure that water and sanitation services, whether privately or publicly provided, are affordable for all, including the poorest, and that water and sanitation tariffs do not compromise or threaten the realization of other rights.

52. While affordability provisions in water and sanitation laws are quite common, the challenge is to translate general provisions into concrete affordability standards (see A/HRC/30/39, para. 26). The Global Analysis and Assessment of Sanitation and Drinking Water 2016-2017 country survey indicates that 68 per cent of respondent countries have a regulatory authority that is responsible for setting urban tariffs for either drinking water or sanitation or both. To ensure the affordability of services, regulatory frameworks must capture the specific needs of the several groups that live in vulnerable situations and offer differentiated solutions for the two main expenses incurred by users: the one-off connection fees that contribute to capital construction costs, and the cost of the recurrent charges (tariffs for operation, maintenance, capital assets renewal, and any financing costs of capital for new fixed assets). To this end, regulatory actors must promote the use of appropriate measures, including free or low-cost service provision for households with very low or no income, income supplements, social tariffs and targeted subsidies. It is essential that financial sustainability does not become the priority of tariff-setting, to the detriment of affordability, but that both elements are reconciled. Similarly, it is essential that investment in the extension of distribution networks to low-income unserved areas is not delayed in an attempt to minimize the affordability challenge.

53. Inextricably linked to the question of setting affordability standards for water and sanitation services is the issue of disconnections. Regulatory frameworks should set an outright prohibition on disconnections due to inability to pay.

5. Acceptability, privacy and dignity

54. The regulatory framework must provide a contextual meaning of the social and cultural acceptability of water and sanitation facilities. This cannot be done in a meaningful way without the genuine participation of those who use the services. While water should be of an acceptable colour, odour and taste for each personal or domestic use,[26] these are highly subjective parameters, and perceptions of these characteristics depend on local culture, education and experience.[27] Personal sanitation is a highly sensitive issue across regions and cultures, and differing perspectives about which sanitation solutions are acceptable must be taken into account when designing, positioning, and setting conditions for the use of sanitation facilities (see A/70/203, para. 13). Regulations should stipulate that facilities need to allow for acceptable hygiene practices in specific cultures, such as anal and genital cleansing, and menstrual hygiene (see A/HRC/12/24, para. 80). Acceptability often requires separate facilities for women and men in public spaces, and for girls and boys in schools, which should be reflected in regulatory frameworks. Regulation should play an essential role in ensuring that toilets are constructed in a way that safeguards privacy and dignity.

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[25] Inga Winkler, "The human right to sanitation", *University of Pennsylvania Journal of International Law*, vol. 37, No. 4 (2016), p. 1383.

[26] See Committee on Economic, Social and Cultural Rights general comment No. 15, para. 12.

[27] *Manual of the Human Rights to Safe Drinking Water and Sanitation for Practitioners*, p. 20.

6. Participation and access to information

55. To meet human rights standards, regulatory decision-making processes must ensure genuine public participation in key decisions. Every individual and group has the right to participate actively, freely and in a meaningful way in the process of setting service standards that may affect their enjoyment of the rights to water and sanitation. Positive measures will often be required to ensure that all people, including women and populations in vulnerable situations, are given a real opportunity to take part in and influence the making of regulations. The Special Rapporteur cautions that attempts to ensure women's participation through regulatory processes may not correspond to local customary norms and the implementation may subsequently fail (see A/HRC/33/49, paras. 56 and 59). Therefore, mechanisms must be put in place to involve women in formulating regulations on water and sanitation and to remove barriers to their participation.

56. Regulations should ensure that decisions on the type and location of services and on improvements to services are participatory and inclusive. Inclusiveness in this process is crucial, so that services are designed to respond to the needs of the population, including of those in vulnerable situations.

57. Access to information and transparency are essential in order for participation to be meaningful. Regulatory actors must enable a culture of transparency by providing access to information that is objective, comprehensible, clear and consistent and is made available to everybody in different formats and in the appropriate language. The Special Rapporteur has observed that in El Salvador, decisions on water rationing measures are not systematically publicized and there seems to be no standard rule for informing users about such measures (see A/HRC/33/49/Add.1, para. 32). Similarly, the results of quality tests on water for human consumption are neither made public nor sent to users. Regulation of the ways in which information should be shared is therefore essential.

7. Equality and non-discrimination

58. A regulatory framework should contain positive measures or affirmative action that ensure the progressive realization of the human rights to water and sanitation for all, in a non-discriminatory manner, while eliminating inequalities in access, including for individuals belonging to groups at risk and groups that are marginalized on the grounds of race, gender, age, disability, ethnicity, culture, religion, national or social origin or any other grounds. Such measures should target specific challenges, including: (a) prioritization of the extension of coverage of water and sanitation services to rural and deprived urban areas, while taking into account the specific needs of women and children; (b) the denial of the rights to water and sanitation to people living in informal settlements, on the grounds of their housing or land status; and (c) the lack of affordability of services for the poorest.

8. Sustainability

59. When setting standards, regulation should aim to achieve the economic, environmental and social sustainability of service provision. Regulation should mirror the State's obligation to guarantee the rights to water and sanitation sustainably and without discrimination, for both present and future generations.[74] This means that today's services should not limit or negatively affect future generations' access to services. To that end, when developing a regulatory framework, States should ensure an integrated regulatory approach for the services, including both the regulation of the sector as a whole and the regulation of each service provider individually.[75] Regulation also has a role to play in contributing to providing preparedness and resilience measures for emergency situations.

60. Promoting the affordability of services, together with a level of cost recovery that meets the requirements for financial sustainability, is a major challenge for regulatory frameworks. Regulatory actors must strike the fine balance between enabling service providers to adequately perform operational and maintenance activities, considering

[74] See Committee on Economic, Social and Cultural Rights general comment No. 15, para. 11.

[75] Lisbon Charter, art. 7.3.

infrastructural, environmental and resource costs, and ensuring affordability. Economic perspectives and human rights perspectives are possible to reconcile, requiring from regulatory actors innovative approaches and a redesign of economic instruments in some situations.

9. Accountability

61. In order to be effective, regulatory frameworks should allow for independent monitoring of service providers' compliance with the human rights to water and sanitation and should safeguard the right of individuals to submit complaints when the enjoyment of their rights to water and sanitation has been compromised.[50] Regulatory frameworks should impose appropriate and proportionate sanctions on service providers in cases of non-compliance with the normative content of the human rights to water and sanitation.[51]

B. Monitoring implementation

62. Monitoring is essential for understanding current levels of access to water and sanitation services — by focusing on issues such as affordability and water quality, identifying barriers to access for unserved or underserved populations, and ensuring that participatory processes are inclusive. National and local monitoring processes gather information that helps identify drivers and bottlenecks, highlight gaps, and assess strengths and challenges, and as such are essential for the realization of the human rights to water and sanitation.

63. Regulatory actors play an essential role in monitoring service providers' compliance with the normative content of the human rights to water and sanitation. Access to information is crucial in this process. Regulatory actors must be able to collect, analyse and disseminate accurate information on the performance of all service providers. On the other hand, service providers have the responsibility to provide to regulatory actors complete and reliable information on the services, including on their quality, on complaints received from users and on challenges faced in extending services to poorer areas.

64. Monitoring should not only examine compliance of service providers with national and local standards, but should also assess whether the provision of services is carried out in a way that ensures compliance with international human rights obligations such as equality and non-discrimination, participation, access to information and accountability. Regulatory actors are responsible for setting and monitoring indicators of progress towards the realization of the human rights to water and sanitation, which should reflect human rights principles and standards in a direct way. Indicators should cover all the different elements of the rights to water and sanitation and be disaggregated by prohibited grounds of discrimination,[52] while setting specific benchmarks (feasible targets for gradually meeting the indicators) in relation to each indicator.

65. The principle of progressive realization should guide the monitoring process and any retrogression observed in service provision should be prohibited and sanctioned by the regulatory framework.

1. Formal service providers

66. Regulatory frameworks are often only applied to formal service providers, which may range from large-scale utilities to small municipal and cooperative providers. Where formal provision exists, it is expected that there will be available data on standards and targets set, which can be monitored by a regulatory actor. However, small municipal and cooperative providers often have more difficulties in living up to quality standards than large-scale utilities do. Regulatory actors can play a proactive role in enhancing small-scale

[50] Ibid., art. 44.
[51] Ibid., art. 49.
[52] See Committee on Economic, Social and Cultural Rights general comment No. 15, para. 53.

providers' performance by monitoring them, providing them with information and recommending strategies that might help them improve their standards.

67. According to *Investing in Water and Sanitation: Increasing Access, Reducing Inequalities* (UN-Water Global Analysis and Assessment of Sanitation and Drinking Water, 2014 report), less than half of countries report a functioning process whereby formal rural drinking-water service providers report the results of their internal monitoring to regulatory authorities and also use the results to trigger corrective action. Moreover, performance results are not typically made public for a majority of service providers. Only for urban formal service providers were performance results made public for over 60 per cent of respondent countries. Countries indicated that the extent of independent surveillance of water quality was far greater in urban areas: nearly 70 per cent of countries reported surveillance in urban areas, compared to only 40 per cent in rural areas.

68. Similarly, formal sanitation service providers, whether urban or rural, typically do not report data to regulatory authorities. While a regulatory framework and standards for sewerage networks are generally available, they are not always effectively put in place and monitored.[33] Sewerage systems often raise affordability concerns for the State, the service provider and the user and require careful monitoring. Connection charges may prevent poorer households from making use of this service, unless appropriate regulation is in place to ensure affordability.

2. Informal service providers

69. The situation becomes far more complex when monitoring informal small-scale providers. Piped systems are often not available to rural households or to those living in informal settlements in urban areas (see A/70/203, para. 64). This represents a significant problem of inequality in access, as people living in these areas, who are often poorer, have to rely on alternatives that are often of lower quality and that tend to cost far more. In these situations, some types of services, such as informal shared or communal facilities and unregulated individual on-site solutions, are seen as necessary short- to medium-term solutions. However, without suitable regulation and monitoring, none of these services can be guaranteed to comply with human rights standards.

70. Non-governmental organizations and community-based organizations are taking on an important role in informal service provision, stepping in where the State is not involved in such activities. Many of the same challenges in relation to regulation and accountability apply to the activities of such organizations, for instance ensuring consistent standards as regards quality of services and ensuring that organizations are accountable to the people they serve. Population groups in many countries are served by community and informal service providers, which rarely report internal monitoring results to authorities.[34]

71. One approach to monitoring in informal settlements that has shown positive results is the use of participatory geographic information systems, which merge technical spatial information with a local community's location-specific knowledge, often producing rich data including on land use, water sources, differentiated access to resources and sites of actual or potential environmental hazards. For instance, OpenStreetMap[35] initiatives in informal settlements in Nairobi have generated detailed data indicating how many households share a toilet, whether there are gender-specific toilets, whether the toilets have disability access and whether the toilets provide sanitary bins for women (see A/69/213, para. 82).

72. It is important that States and regulatory actors recognize the existence of informal service provision and assess the role that it plays in a given context. While the choice of the best policy approach to informal providers rests with the State and will depend on the particular circumstances of each case, human rights law prescribes that where services are

[33] See A/70/203, para. 46. See also www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/Differentlevelsandtypesofservices.aspx.

[34] Ibid., para. 19.

[35] See www.openstreetmap.org.

operated or controlled by third parties, States must prevent them from compromising equal, affordable and physical access to sufficient, safe and acceptable water.[16] In such cases, the Committee on Economic, Social and Cultural Rights advises that an effective regulatory system must be established. It is important, in these situations, that regulatory instruments and the institutional set-up chosen be adapted to the nature of small-scale service provision.

73. The State of Palestine reports that in its territory informal providers are not only present but are essential to ensure some communities' access to water. This delivery is the only effective option for many communities, hence it is considered a public service. Currently, different governmental institutions are collaborating in order to ensure regulation and supervision of these informal providers. Efforts are being made to license and certify them. The Government's long-term strategy is to fully connect local communities to public water distribution networks, but in the short term the strategy is to regulate this service and facilitate the mutual support between the local communities and informal service providers.

74. In Kenya, on the other hand, the regulatory framework does not apply to water providers who supply fewer than 20 households or less than 25 cubic metres of water per day for domestic use. These providers are currently outside the regulated tariff structure and the system of regular quality inspections.[17] The Government's position is that in the long term, informal service providers should be linked to the formal system, and should comply with official tariffs and quality standards. In the short term, the Government tolerates informal provision but does not regulate it.

75. Whether States decide to aim for regulation, or to use incentives for the provision of quality services at affordable prices, or to phase out small-scale providers in the long term and replace them with formal provision, it is essential that they do not worsen the situation and leave people without access to services (see A/HRC/15/31, para. 53). In particular, when granting exclusivity to formal providers extending into areas that have previously been served by small-scale providers, States must ensure that connection to a piped network is actually an affordable alternative. In these situations, affordability studies should be carried out by regulatory actors in order to avoid retrogression.

76. The regulation of water and sanitation services (or the lack thereof) in rural areas is similarly challenging. Rural water supplies are often managed by local community organizations or members, untrained and unpaid, and it is argued by some that they would benefit from provision of training, resources, and assistance, rather than regulatory enforcement.[18] However, these two measures are not incompatible and it is a question for governments to balance support for communities with regulation.

77. The WHO/UNICEF Joint Monitoring Programme for Water Supply and Sanitation 2015 update shows that 70 per cent of people who do not use improved sanitation facilities, and 90 per cent of people who practise open defecation, live in rural areas. From a regulatory perspective, rural sanitation is a major challenge, as the need for safe sanitation is often not recognized. The construction and maintenance of latrines is often neglected, partly due to the taboo surrounding sanitation. Often, the vast majority of sanitation solutions are not regulated, managed or monitored by any State body (see A/HRC/33/49/Add.2, para. 14). The recognition of sanitation as a distinct right by the General Assembly and by the Human Rights Council warrants its political prioritization by States and the creation of an enabling environment for its progressive realization, including through the establishment of appropriate regulatory frameworks, adapted to local circumstances, that address the individual dignity and public health dimensions of this right.

[16] See Committee on Economic, Social and Cultural Rights general comment No. 15, para. 24.

[17] United Nations Development Programme, *Small-scale Water Providers in Kenya: Pioneers or Predators?* (2011), p. 29.

[18] WHO, *Water Safety Planning for Small Community Water Supplies: Step-by-step Risk Management Guidance for Drinking-water Supplies in Small Communities* (2012).

3. Regulatory bodies

78. Compared to other areas of regulation, water and sanitation regulation is characterized by the fact that the regulated services relate directly to the fulfilment of human rights. While water and sanitation regulatory bodies are well positioned to contribute to the progressive realization of the rights to water and sanitation, their activities, whether through their regulations and decisions or through failure to live up to their mandate, can also potentially result in breaches of these rights. In their plans and activity reports, regulatory bodies should provide clear and relevant information on their policies, procedures and activities and indicate how they contribute to meeting human rights standards progressively.

79. Regulatory bodies' activities should be controlled and monitored by different entities, such as user councils, parliamentary committees or courts of auditors. For example, in early 2014, the Portuguese Court of Auditors released a report on the audit of the regulation and management of water service concessions and public-private partnerships. The Court's audit examined the activity of the Water and Waste Services Regulatory Authority as the regulator of such concessions, identified the processes of contract revision, identified public spending involved in each concession and examined the effectiveness of concessions in terms of the quality of services (see A/HRC/36/45/Add.1, para. 39). Its main conclusions show that the majority of concessions consistently benefited the private sector to the detriment of municipal budgets and of affordability of services for users (see A/HRC/36/45/Add.1, paras. 39 and 40).

C. Ensuring accountability

80. Accountability at the national level can be achieved through administrative, quasi-judicial and judicial mechanisms. Mechanisms can be based at the level of the service provider or at the level of the State. For example, when a complaint is not resolved at the level of the service provider, individuals should have the right to address their complaint to an administrative mechanism such as a regulatory body.

81. Regulatory actors play a key role in ensuring service providers' accountability for non-compliance with the human rights to water and sanitation. To ensure accountability, regulatory frameworks must clearly define the roles and responsibilities of all stakeholders involved in service provision and provide clear and accessible information on the complaint mechanisms available at different levels. A growing number of independent regulatory bodies have complaint mechanisms for the resolution of disputes between service providers and users.

82. In the resolution of complaints against services providers, regulatory actors must ensure that any action that interferes with an individual's enjoyment of the rights to water and sanitation is preceded by an opportunity for genuine consultation with the individual affected, the timely and full disclosure of information on the proposed measures, reasonable notice of proposed actions, legal recourse and remedies for the individual affected, and legal assistance for obtaining legal remedies.[39]

83. The regulatory body must also be endowed with the power to enforce existing regulations and contractual agreements. Mechanisms for contract enforcement must include adequate incentives, penalties for non-compliance, such as fines, and the possibility of revocation of the contract (see A/HRC/15/31, para. 52).

84. In countries where no separate regulatory mechanism exists, but where national human rights institutions or ombudspersons' offices are present, individuals may resort to these independent bodies for redress when their human rights to water and sanitation have been compromised by a service provider. Accountability can be provided by these quasi-judicial bodies, whose mandate often includes handling human rights complaints.

[39] See Committee on Economic, Social and Cultural Rights general comment No. 15, para. 56.

85. When administrative or national quasi-judicial mechanisms do not exist or are not able to successfully resolve a dispute, the right to an effective remedy requires that people whose rights to water and sanitation have been affected be able to turn to a court. A right of judicial review as a last resort is sometimes indispensable. In this context, it is critical that judicial systems uphold the justiciability of the human rights to water and sanitation in line with international human rights law.

86. Accountability must be ensured not only in relation to service providers but also in relation to regulatory bodies' decisions and activities. The International Water Association's Lisbon Charter emphasizes that regulatory frameworks should establish the necessary mechanisms to ensure accountability and public scrutiny of regulatory bodies.[40] Individuals should have the right to judicially challenge a regulatory body's decision or regulation that interferes with the enjoyment of their human rights to water and sanitation. The Colombian water and sanitation regulatory commission issued a number of regulations obliging service providers to disconnect water services when there is no payment during a three-month period. However, cases brought before the Constitutional Court by low-income families were ruled in the families' favour, as they were being deprived of a "minimum essential level of water" due to their inability to pay.[41]

V. Conclusions and recommendations

87. **Regulatory frameworks are essential for the implementation of the human rights to water and sanitation and must support the State's obligations with regard to these rights. International human rights law does not call for a particular choice of regulatory framework. What is essential from a human rights perspective is that those carrying out regulatory functions be immune to pressures from any illegitimate interests and that the main objectives of regulation be aligned with the water and sanitation human rights standards and principles. Regulation plays a key role in monitoring service providers' compliance with the normative content of the human rights to water and sanitation and in ensuring accountability. Identifying and avoiding violations of these rights and retrogressions in their progressive realization is also key for the regulation of water and sanitation services. As public bodies, regulatory actors are bound by States' international human rights obligations, and their functions should go beyond mere policing and include supporting and influencing policy changes in line with the human rights framework.**

88. **The Special Rapporteur considers that a more nuanced approach is needed regarding the concept of independence of regulatory bodies. In particular, the involvement of governmental sectors in specific situations of regulatory decision-making should be safeguarded when it is relevant to ensure that human rights standards are met.**

89. **In line with the above, the Special Rapporteur recommends that States:**

(a) **Adopt water and sanitation policies and strategies incorporating the human rights to water and sanitation, and take deliberate, concrete and targeted steps to establish a regulatory framework informed by these rights and regulatory bodies operating in an impartial, transparent and rights-based manner;**

(b) **Clearly define necessary procedures and measures in the regulatory framework to meet the State's obligations to respect, protect and fulfil the human rights to water and sanitation;**

(c) **Ensure that the mission, mandate and objectives of regulatory actors incorporate the principle of progressive realization of the human rights to water and sanitation without discrimination of any kind;**

[40] Lisbon Charter, art. 7.6.

[41] See www.corteconstitucional.gov.co/relatoria/2009/T-546-09.htm and www.corteconstitucional.gov.co/relatoria/2012/T-273-12.htm.

(d) Ensure that regulatory frameworks provide a multifaceted and differentiated interpretation of affordability, capturing the specific needs of those living in vulnerable situations;

(e) Ensure that access to water and sanitation services is not conditioned by land tenure in law and in regulatory frameworks;

(f) Ensure through adequate regulation that, when extending formal services to informal settlements, these services are affordable and do not interfere with people's access;

(g) Prohibit disconnections due to inability to pay, in law and in regulatory frameworks;

(h) Ensure that instruments delegating service provision, including contracts, reflect the national regulatory framework and human rights standards;

(i) Include, in regulatory frameworks, specific requirements ensuring adequate provision of services to, inter alia, homeless people, poor nomadic communities, and victims of situations of armed conflict, emergencies, natural disasters or climate change effects;

(j) Include, in regulatory frameworks, specific requirements ensuring adequate provision of services to, inter alia, schools, health facilities, prisons, transport hubs and public spaces in general;

(k) Establish the necessary mechanisms to ensure accountability of regulatory actors;

(l) Inform and train regulatory actors on the practical implications of the realization of the human rights to water and sanitation in their area of work.

90. **In addition, the Special Rapporteur recommends that regulatory actors:**

(a) Comply with the State's international human rights obligations with regard to the rights to water and sanitation and take targeted steps towards the full realization of these rights;

(b) Carry out independent monitoring of service providers' compliance with the normative content of the human rights to water and sanitation and ensure that in cases of retrogression providers address the root causes of these violations;

(c) Set and monitor indicators that cover all the elements of the rights and disaggregate them by prohibited grounds of discrimination;

(d) Ensure non-discriminatory service coverage by service providers, including to poorer neighbourhoods, informal settlements and rural areas;

(e) Provide access to objective, comprehensible, clear and consistent information and facilitate free, active and meaningful participation in regulatory decision-making processes;

(f) Ensure that tariff-setting reconciles financial sustainability with affordability, while prioritizing and protecting the needs of those living in poverty;

(g) Support and influence policy formulation and legislative changes in line with the human rights to water and sanitation;

(h) Provide clear and relevant information on their policies, procedures and activities and indicate how they contribute to the progressive realization of the human rights to water and sanitation;

(i) Safeguard the right of individuals to submit complaints when the enjoyment of their rights to water and sanitation has been compromised by service providers.